

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

A La Carte Pricing and Programming for
Cable Television

MB Docket No. 04-207

COMMENTS OF
NATIONAL ASSOCIATION OF TELECOMMUNICATIONS
OFFICERS AND ADVISORS

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July 15, 2004

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SUMMARY

These comments are filed on behalf of the National Association of Telecommunications Officers and Advisors (NATOA) and are submitted in NATOA's capacity as the spokesperson of local government entities which share responsibility with the Commission as Congressionally-recognized regulators of the cable industry.

In response to the Commission's inquiry, NATOA surveyed its members to fill in some information gaps on key issues related to a la carte pricing and programming. The survey revealed that:

- Subscribers desire more choice of service providers and real control over price and content of multichannel video programming;
- Complaints about rate increases are frequent in both those communities where there is rate regulation and those that have been certified by the FCC as subject to "effective competition;"
 - 95% of respondents received complaints regarding "regular" or annual rate increases by cable operators;
 - 88% of respondents in communities with systems the Commission has determined are subject to "effective competition" received complaints regarding "regular" or annual rate increases by cable operators;
- Approximately 85% of respondents have received subscriber complaints about not being able to choose the channels they pay for; and

- 74% of respondents expressed a willingness to accept the authority to also regulate the cable programming service tier (CPST) to be able to address local concerns with the rising CPST prices.

NATOA members support policies that will enable subscribers to select video services that meet their individual needs with regard to a multitude of diverse programming and content at market-based prices that would occur in a truly competitive market. Without a truly competitive market or effective rate regulation, however, subscribers will continue to face monopoly prices for cable services.

NATOA suggests that cable industry claims that a la carte is not practical is at odds with the previous history of cable operators' attempts to use a la carte pricing to avoid rate regulation.

NATOA members support the retention of the basic service tier (BST) for all subscribers. Maintaining the congressionally mandated BST that includes broadcast as well as public, educational and governmental (PEG) channels continues to meet the public interest and is necessary to maintain continued expansion of programming that is diverse and serves local interests. Furthermore, expanding the minimum basic tier to also include all "free" channels would increase exposure to new, diverse and lesser known programming.

NATOA has reason to believe that information on the use of retransmission consent agreements and their impact on rates and subscriber choice is important to the Commission's consideration of the issues pertaining to a la carte offerings and warrants further inquiry.

NATOA members report that mandatory use of set-top boxes has increased over the past several years. Cable operators are, for example, moving premium channels to a digital tier, and requiring subscribers to lease a digital box in order to continue to receive programming previously enjoyed without such a device. In addition, the manner in which the leasing has been managed seems to frequently result in subscribers being forced to purchase more programming than requested or desired.

Until subscribers have more control over choice of provider, content and price of service, it will be necessary to take interim measures to ensure subscribers are protected from unreasonable prices for cable services.

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I. INTRODUCTION

**A. Local Governments' Role as the Co-regulators of Cable
Services**

NATOA is a national association that represents over 1,000 local government agencies, local government staff and public officials, as well as consultants, attorneys, and engineers who consult local governments on their telecommunications needs.

Pursuant to the Communications Act of 1934, as amended, our government members are the regulators of cable operators with regard to rates for the basic service tier (BST) and for equipment and installation charges.¹ Our members thus stand on equal footing with the Commission as congressionally-recognized co-regulators of cable operators.² We note that as a result of the 1996 Telecommunications Act and the “sunset” of CPST rate

¹ See 47 U.S.C. §§ 543 and 544.

² NATOA's members' other responsibilities range from cable administration, telecommunications franchising, rights-of-way management, and governmental access programming to information technologies and I-NET planning and management.

regulation, only local governments have had direct contact in recent years with both operators and subscribers relating to the issues of rates and service.

B. NATOA Policy statements

NATOA has adopted several policies pertaining to issues raised in this proceeding. Specifically, NATOA supports:

- local authority to develop public, educational and governmental access channels, community programming and related services;
- the orderly transition to a truly competitive communications marketplace;
- diversity in media and telecommunications ownership and content.

NATOA supports policies that enable subscribers to choose video services that meet their individual needs with regard to a multitude of diverse programming and content, at prices that would be experienced in a truly competitive market among a variety of both wireline and wireless providers. NATOA believes that real choice in cable service, price and content, or a multitude of video providers from which to select, is not realistically going to occur in the near future. Without a truly competitive market or effective rate regulation, subscribers will continue to face monopoly prices for cable services if interim measures are not taken to protect subscribers from unreasonable rates.

II. HISTORICAL

The Commission asked for comments on the historical availability of a la carte services. As a co-regulator of cable services with the Commission, NATOA's members have extensive experience with the history and current legal framework regarding a la carte pricing.

A. Industry Use of A La Carte Pricing in 1993-1995

NATOA suggests that cable industry claims that a la carte is not practical is at odds with the previous history of cable operators' attempts to use a la carte pricing to avoid rate regulation.

As the Commission has previously found, the cable industry has used a la carte channel offerings in the past as a means to avoid rate regulation. The cable industry first introduced a la carte in 1993, after the 1992 Cable Act provided that the Commission's rate regulation guidelines should exclude consideration of "programming provided on a per channel or per program basis."³ The cable industry responded to the regulatory changes by offering a limited number of channels on an a la carte basis, with the same channels offered in special tiers. The industry then priced the a la carte channels at levels so high that it made sense to purchase a la carte channels only as a tier package. Nevertheless, by offering the channels a la carte, the operators were then able to claim exemption from rate regulation of the tiered service.

The use of combined a la carte/tier pricing to avoid FCC regulation prompted a series of complaints to the FCC, which ultimately ruled that there was no legitimate reason for a la carte/tier structuring "other than to avoid rate regulation."⁴ Subsequently, in its Sixth Order on Reconsideration, the Commission ruled that a la carte channels also

³ Cable Television Consumer Protection and Competition Act of 1992, Pub. Law 102-385, § 3, 106 Stat. 1460 (1992); *see also* Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Buy-Through Prohibition, 58 Fed. Reg. 19,627 (1993) (to be codified at 47 C.F.R. § 76.900) (implementing § 3 of the 1992 Act and prohibiting cable operators from requiring subscribers to purchase any tier of service, other than the basic service tier, as a condition of access to video programming offered on a per channel or per program basis).

⁴ *In the Matter of Comcast Cablevision City of Tallahassee, Florida, Letter of Inquiry*, Memorandum Opinion and Order, 9 FCC Rcd. 7773, 15 (1994). The full Commission affirmed this approach. *See In re Comcast Cablevision City of Tallahassee, Florida, Letter of Inquiry, Application for Review*, Memorandum Opinion and Order, 11 FCC Rcd. 1246 (1995).

offered as part of a tier would be subject to CPST rate regulation, thus ending the use of a la carte channel offerings as a means to evade rate regulation.⁵ After these regulatory changes in late 1994, very few cable operators offered a la carte purchasing options.

While this brief history indicates the nature and purpose to which the industry used a la carte offerings in the past, it also clearly evidences that there are no technological barriers to its ability to do so. And, since the deregulation of the CPST in 1998, there have also been no regulatory barriers to its ability to offer such choices to subscribers. The industry's decision to change its past policies and to advocate against any provision of a la carte services is an area that is deserving of close scrutiny by the Commission.⁶

B. Current Barriers to A La Carte

As indicated above, with respect to the CPST, there are no current regulatory barriers to a la carte. However, with respect to the BST, the congressionally mandated "must carry" rules forbid cable operators from offering BST channels a la carte. Local broadcast channels and PEG channels must be carried on the basic service tier.⁷ NATA members support the continuation of a statutory requirement that cable operators provide a basic tier to all subscribers, and that such tier continue to include all broadcast and local public, educational and governmental channels.

⁵ Cable Television Act of 1992, 59 Fed. Reg. 62,614 (1994).

⁶ See *The Pitfalls of A la Carte: Fewer Choice, Less Diversity, Higher Prices: A NCTA Policy Paper* (May 2004).

⁷ 47 U.S.C. §543(b)(7)(A).

III. RATES

The Commission requests information on the impact that a la carte pricing will have on multi-channel video programming rates. It is clear from NATOA's survey that ever increasing rates is a prime motivation for subscriber support of a la carte policies. What is not clear, however, is the impact that requiring a la carte pricing will have on subscriber rates. It may be that the introduction of a la carte will not cause consumer rates to be lower. This is in part possible because the costs of certain new or niche programming may substantially increase as the costs of such programming are spread over fewer viewers. Absent a comprehensive analysis of the components of the rate structure, it would appear that neither the Commission nor local governments have sufficient information to predict that outcome. We are confident that in deregulated markets not subject to real competition, subscribers are just as likely to continue to face monopoly prices for a la carte channels as they have for tiered services since deregulation.⁸

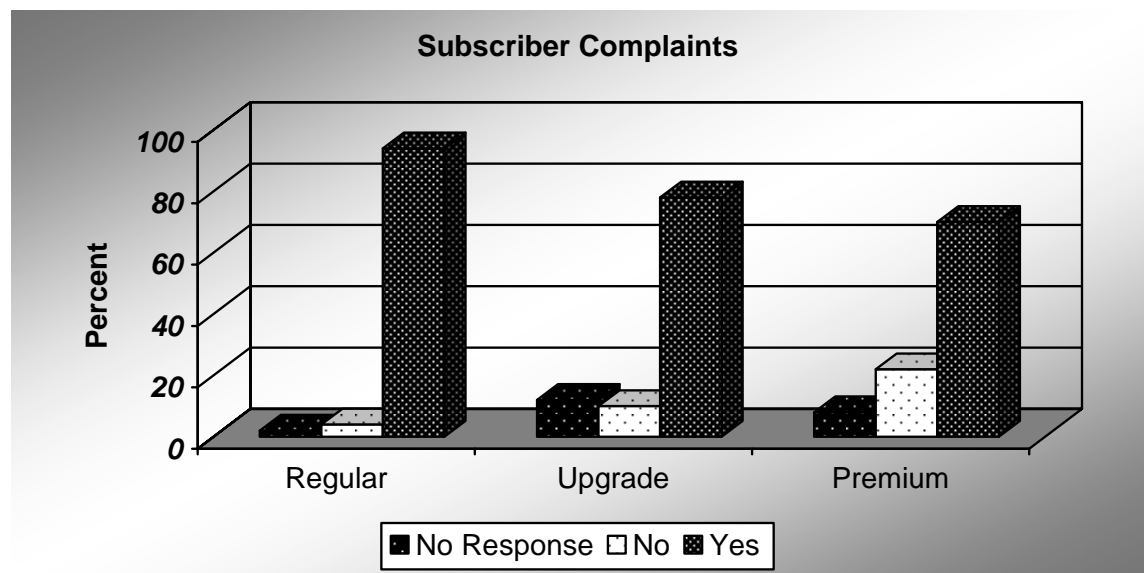
A. Local Government Regulatory Views Regarding Rates and Control Over Content

In response to the Commission's notice, NATOA surveyed its regulatory members on key issues related to a la carte pricing. We received responses from around the United States from Maine to Hawaii, Minnesota to Louisiana and Washington to Florida. The responses covered a population of over 24 million and nearly 6 million

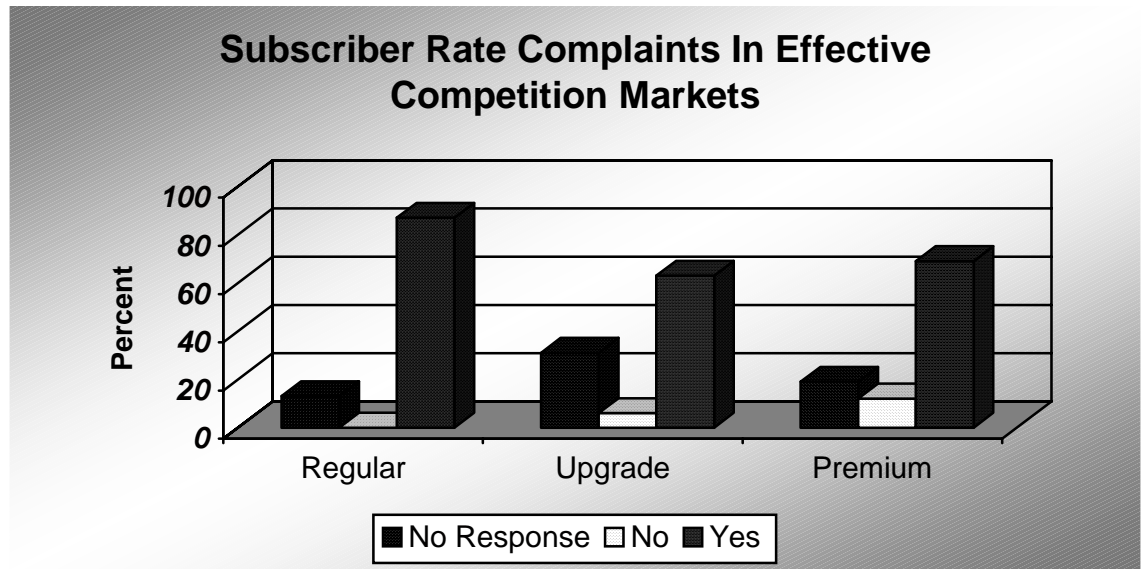
⁸ See U.S. General Accounting Office, *Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 36-37 (October 2003) (raising possibility that operators will respond to a la carte pricing requirements with strategies that will leave subscribers with the same or higher rates for access to fewer channels).

cable subscribers. The Commission has found effective competition in approximately 15% of the local communities responding.

Concern over increasing cable rates was prevalent in the survey.⁹ NATOA members report receiving complaints about the level of cable rate increases, including in communities certified by the Commission as subject to effective competition. As the tables below show, in both deregulated and regulated communities, NATOA members report a similar incidence of complaints about prices after 1) a ‘**regular**’ rate increase, 2) an ‘**upgrade**’ rate increase, or 3) after **premium** services (e.g. HBO, Showtime, Starz, Encore, etc.) were migrated from analog to digital service.



⁹ According to the U.S. General Accounting Office, the average cable bill increased over 40% in the last five years, compared to an increase in the Consumer Price Index of just 12% over the same period. GAO, *Telecommunications: Issues Related to Competition*, 20-21.



The NATOA survey asked respondents to report on whether subscribers in their area had requested more control over choice of channels and price and, if so, to identify any and all motivations expressed by subscribers.¹⁰

- 84% of the respondents, including 75% of the respondents in areas certified as subject to effective competition, stated that subscribers in their community have “asked for, requested, or expressed a desire to be able to choose the channels they pay for.”
- Over 90% of the respondents who identified subscriber requests to choose channels they pay for listed “because they do not want to pay for what they don’t watch” as motivating the requests; 75% of the respondents stated a desire to “control monthly amount spent on cable”; 40% of the respondents listed a concern to have “control over sex and violence.”

¹⁰ Respondents were permitted to select any or all of the following choices: “because they don’t want to pay for what they don’t watch; you control monthly amount spent on cable;” and/or to have “control over sex and violence.”

B. Need for Analysis of Programming Contracts

In investigating the potential rate impacts of a la carte pricing, it may be helpful for the Commission to ascertain the cost of programming to cable operators.¹¹ Through NATOA members' experience in rate regulation proceedings, we have found that the most detailed information on the costs of programming are contained in contracts between programmers and cable operators. Some of these rate schedules may be available in the public record.¹² NATOA would be concerned by any rate analysis presented by the industry on this topic. The current contractual and ownership scheme between cable operators and programmers does not appear to support a migration to a la carte, and as such could potentially skew any rate analysis. The Commission may wish to seek additional contracts as part of its investigation in this matter.

C. Support of BST

The Commission asked whether the rate impacts of a la carte pricing would vary depending on whether a basic tier was maintained as a legal requirement. NATOA and its members believe that all subscribers should receive a basic tier, as currently required by federal law.¹³ There is a compelling public interest in ensuring that everyone has access to a basic level of service that includes local broadcast and PEG channels. NATOA's position on BST and PEG is described further below, in response to the Commission's question concerning diversity of programming.

¹¹ In the absence of true competition or rate regulation, uncovering the cost of programming to cable operators may reveal little to the Commission about the price that will be charged to subscribers.

¹² For example, the Commission may wish to consult the record in *Century TCI-California, (d/b/a/ Adelphia Communications Corp.) Appeal of Order Setting Basic Service Rates of Los Angeles CA*, CASB-A-0690, DA 03-2554 (2003), which contains a full schedule of programming costs.

¹³ See 47 U.S.C. §543(b).

IV. RETRANSMISSION CONSENT

NATOA has not researched how broadcast networks and affiliated groups use retransmission consent to expand carriage of affiliated programming. NATOA agrees that this is a key area of inquiry and encourages the Commission to require cable operators and broadcast networks to provide the Commission with evidence on the number and extent to which retransmission consent agreements require cable operators to carry broadcaster affiliated programming. It may also be important to ascertain the impact of these agreements on the operator's ability to provide choice of service offerings to subscribers.

V. DIVERSITY OF PROGRAMMING

NATOA members fully support diversity of programming and diversity in ownership of such programming. A democratic society depends upon an educated and informed population. An educated and informed population depends on the availability of a wide variety of opinions and viewpoints. Thus, it is well recognized that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order."¹⁴

A. The Importance of PEG and Broadcast in the BST

NATOA members support the continued inclusion of local broadcast and PEG channels in the BST. Maintaining a basic service tier that includes access to local broadcast and PEG channels serves the need of all subscribers to have access to a range

¹⁴ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994).

of local and diverse information, and therefore “promotes values central to the First Amendment”.¹⁵

PEG channels provide an important source of local and diverse information not provided by dominant or mainstream media.¹⁶ PEG channels also provide an increasingly important – sometimes the only – source of local information for subscribers.¹⁷ In this regard, NATOA supports the comments being submitted in this proceeding by the Alliance for Community Media. Specifically, NATOA believes it vital that, for the local community to continue to benefit from PEG programming, every subscriber must continue to receive PEG channels in the basic tier. The ability of local governments, educational institutions, social service organizations and others to impart information to the community unfettered by other interests can only be accomplished if PEG continues to reside on the basic tier. Independent local PEG operations should be accorded no lesser public interest treatment than local broadcast stations.

NATOA members also believe that the BST must continue to include all local broadcast channels to serve the “interrelated interests” identified by Congress: “(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the

¹⁵ *Id.* (upholding requirements that cable operators carry local broadcast channels); *see also Time Warner v. FCC*, 93 F.3d 957, 971-74 (1996) (holding that a franchising authority does not violate the First Amendment by seeking “to ensure public ‘access to a multiplicity of information sources’” by conditioning franchises on provision of PEG channels), quoting *Turner Broadcasting System*, 512 U.S. at 663.

¹⁶ *See* H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984) (“Public access channels are often the video equivalent of the speaker’s soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas.”).

¹⁷ *See id.* (“PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local governments at work.”).

widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.”¹⁸

B. Expanding BST to Enhance Diversity

The overwhelming majority of NATOA members responding to its recent survey support maintaining or expanding current BST requirements. A plurality of respondents suggested that BST should be expanded to include all programming for which the cable operator is not required to pay a licensing fee. Such an expansion may help increase the diversity of programming available to subscribers, including channels or programming developed by new or niche programmers that are willing to forego licensing fees to reach a broader audience. NATOA encourages the Commission to consider this option in its report to Congress.

VI. RURAL AND SMALLER MARKETS

The Commission’s questions with regard to rural and smaller markets are apt. The cost of service should not vary significantly between rural and urban areas or among systems of different sizes. NATOA believes that, irrespective of the size or location of a community, all subscribers of video programming services in the U.S. deserve to be protected by the same rules and to receive the same service quality at fair and nondiscriminatory prices.

VII. SET-TOP BOXES

Through its members’ role as the primary regulators of cable equipment,¹⁹ local governments have seen movement in the industry toward requirements that force all

¹⁸*Turner Broadcasting*, 512 U.S. at 662.

¹⁹ NATOA’s members have been regulating the equipment and installation prices for cable since 1993.

subscribers to have a digital set-top box. This trend seems contrary to Congressional intent to eliminate the need for subscribers to use cable de-scrambling devices and leased equipment in order to watch cable TV on a cable-ready TV set.

Cable operators increasingly require subscribers to lease digital set-top boxes as a condition for continuing to have access to premium programming (e.g. HBO and other movie channels) that previously could be viewed on a cable-ready TV without a set-top box. The Commission's regulations are being challenged by cable operator practices of forcing subscribers to buy additional music and guide services in order to maintain access to premium and pay-per-view services.²⁰ Operators are also introducing interactive program guides, impulse pay-per-view and other interactive services that cannot be enjoyed with a uni-directional plug-and-play device (CableCARD).²¹ Thus, to enjoy the full benefit of all available programming and features, subscribers are forced to lease set-top boxes from the cable companies, as these features are not available in set-top boxes purchased at retail outlets.

Associated with the migration of services to digital systems which require set-top box rental, local regulators have witnessed the introduction of additional outlet charges and other outlet-type access charges that were supposed to be effectively eliminated by the 1992 Cable Act.²² NATOA notes that the Commission's buy-through rules are challenged by these arrangements.

²⁰ See *Cable Advisory Council v. Cox Communications*, Complaint CSR 6313-B (filed September 19, 2003; FCC public notice March 31, 2004).

²¹ Historically, subscribers were able to see premium and pay-per-view services on their analog services either by use of a trap or a relatively cheap addressable set-top box.

²² See *Comcast Cablevision of Dallas, Inc. et. al.*, CSB-A-0710, DA 04-1703 (June 14, 2004).

In response to these trends, NATOA urges the Commission to take necessary steps to eliminate the outlet-type and other charges being assessed by cable operators and speed the retail availability of subscriber purchased set-top boxes that are comparable to those currently being leased by cable operators. These tasks will be particularly urgent in any move to a la carte pricing and programming, which may require the use of interactive digital set-top boxes.

VIII. LEGAL AND REGULATORY ISSUES

A. Basic Service Tier Requirements

The Commission inquired whether there are regulatory or legislative barriers to implementing a la carte pricing and programming. As noted above, the Cable Act currently provides for the minimum content of a basic service tier that must be available to all subscribers.²³ NATOA does not support eliminating this federal legal requirement.

B. Regulation of CPST

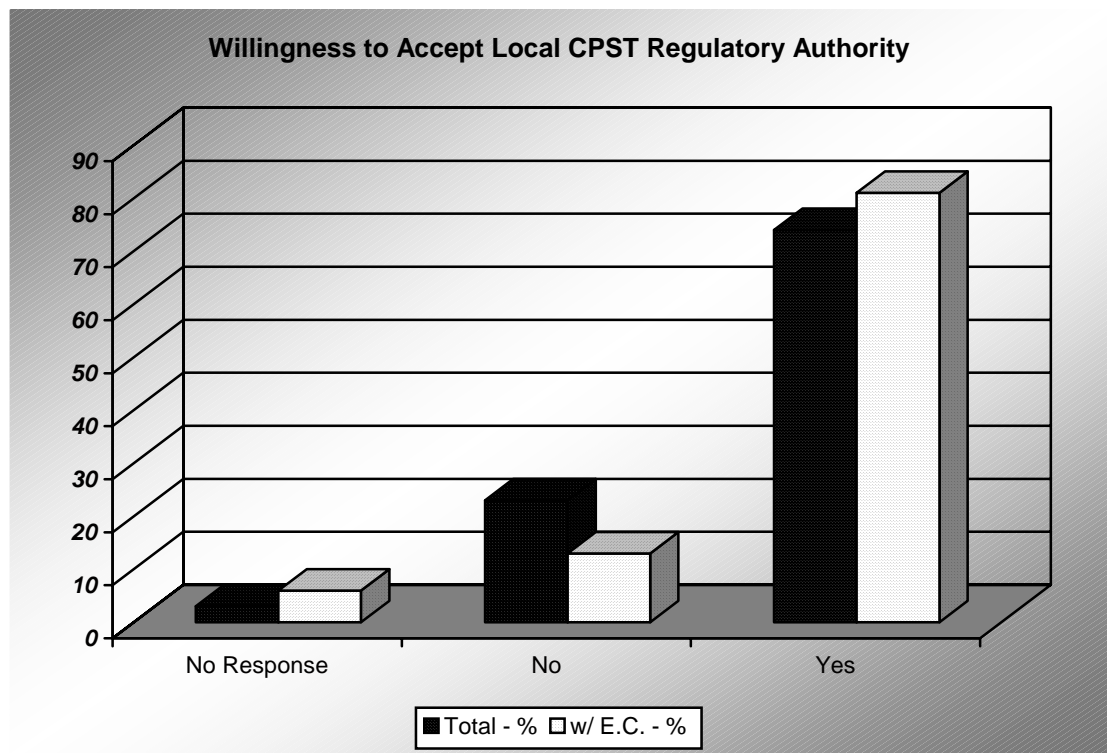
The Commission requested comments on other regulatory or legal issues posed by a la carte pricing. NATOA believes that encouraging a multitude of wireline providers in all markets for video services may, in the long term, lead to subscriber choice with respect to transmission technology, content and pricing. However, currently, only about 2% of the nation's markets are sufficiently competitive to restrain prices to any significant extent.²⁴ Absent market-based price constraints, some form of an interim

²³ 47 U.S.C. § 543(b)(7)(A).

²⁴ Most markets certified by the Commission as subject to effective competition are only subject to competition between a wireline cable provider and a direct broadcast satellite (DBS) provider. For a host of reasons, however, wireline cable and DBS competition is not sufficient to restrain rates to a significant extent. See U.S. General Accounting Office, *Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8, 9 (October 2003) (finding that DBS-only competition had induced rate decreases only "slightly").

measure is appropriate to protect subscribers against monopoly pricing of cable services, including renewed Congressional authority for local governments to regulate the CPST until such time as competitive price constraints are prevalent.

NATOA members have reported that when BST rate increases are denied by local regulators, cable operators frequently move channels to the unregulated CPST. In NATOA's survey, a significant number of respondents reported a willingness to have authority to regulate CPST, including a majority of the respondents in certified competitive areas, as shown below.



NATOA does not agree with the positions of some that rate regulation has had or will have counterproductive effects on the cable industry.²⁵ Rate regulation rules have

²⁵ See *The Pitfalls of A la Carte: Fewer Choice, Less Diversity, Higher Prices: A NCTA Policy Paper* 22

not eroded investment or prevented the advancement of technology or the deployment of more programming networks.²⁶ Cable rates have risen dramatically – by over 50% since 1996 – under deregulation.²⁷ Authorizing the local authority to regulate the CPST will ensure that cable operators will not be able to raise prices in an unconstrained environment without local oversight. The evidence suggests that until true competition develops to restrain prices, subscribers will be better protected with reasonable rate regulation.

C. Additional Questions

Many of the questions asked by the Commission depend heavily on facts that are in the exclusive possession of cable operators and other providers. Those facts will be contained in

- program carriage and affiliation agreements,
- financial data relating to programmer and operator revenue streams from subscriber and non-subscriber (e.g. advertising) sources, and
- price/demand sensitivity data and studies displaying the perceived consumer value of programming alternatives.

(May 2004).

²⁶ According to the FCC's 10th Annual Report on Competition, since 1993 cable subscribership has increased 15.2%, from \$57.2 million to \$65.9 million, industry revenues have increased 125%, expenditures on programming have grown significantly and audience share has increased from an average of a 29 share in 1993 to an average 55 share in 2002-2003 season. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MM Docket No. 03-172 at page 8, ¶16 (January 28, 2004); *see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket #: 95-61, at ¶¶7 and 8 (December 11, 1995) (noting capital expenditures rising 28% between 1993 and 1994 and a marked increase in regional clustering developing through the buy-out of small operators by large ones).

²⁷ *Statement of Commissioner Michael J. Copps in re: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, Adopted June 10, 2004.

Without such data and studies (in a reliable, objective form), neither non-industry commentators, the Commission nor Congress can draw any truly reliable conclusions about many of the questions that the Public Notice raises.

Allowing the cable industry to selectively provide information in response to the Public Notice, without the opportunity of the Commission and others to examine the underlying data itself, will not result in a record from which policymakers can draw any meaningful conclusions. NATOA encourages the Commission to seek all relevant information from cable operators and programmers, and use confidentiality agreements to protect any legitimate concerns of operators and programmers without sacrificing the ability of the Commission or other parties to re-assess the conclusions that the industry draws from the data.

IX. CONCLUSION

Ultimately, subscriber interests would be best served through policies that increase competition among providers of multichannel programming and, where such competition does not lead to price constraint, enabling local officials to effectively regulate noncompetitive markets. In the absence of a truly competitive market or rate regulation for the purpose of constraining rates, a la carte may not prove to be a suitable substitute to address consumer's concerns about rising cable rates. In addition, NATOA believes that the BST must be preserved and at a minimum must include all local broadcast channels and all PEG channels. NATOA would also support an expansion of the minimum BST requirement to include all other channels for which the cable operator is not required to pay a substantial fee for carriage. In the event a la carte is adopted in an effort to provide for greater choice and greater control over rates paid for service,

some interim measures may still be required to ensure the desired result. Such interim measure could include Congress returning to local regulators authority to regulate the CPST or any CPST channels offered on an a la carte basis.

Respectfully submitted,

A handwritten signature in black ink that reads "Libby Beaty". The signature is written in a cursive, slightly slanted style.

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Advisors

July 15, 2004